



FÉDÉRATION INTERNATIONALE DES CONSEILS EN PROPRIÉTÉ INDUSTRIELLE
COMMISSION D'ÉTUDE ET DE TRAVAIL (CET)

CET WORKING DOCUMENT

SUBJECT: Results of Mediation/Arbitration
Survey Forms
PURPOSE: Information
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Thirty (30) questions were presented on alternate dispute resolution (ADR) to the FICPI Delegates. The twenty (20) Country Responses to these inquiries have indicated that ADR is a necessary requirement to ending the expensive alternative of litigation. This universal response directed FICPI to begin the process of assisting in the educating of IP mediators and arbitrators. Responses concluded FICPI would be a good organization to conduct training, that training and maturity of both these ADR choices was in a somewhat infant stage for most countries and that these tools of resolution were underutilized. The responses speak broadly to FICPI participating in a worldwide attempt to bring ADR forward in the best interests of inventors and IP owners.

Twenty countries responded to the two separate surveys. There were thirteen questions in the mediation survey and seventeen questions in the arbitration survey. The following is the general bullet point responses to the inquiries (Survey Responses Appended as Exhibit A (Mediation) and Exhibit B (Arbitration)):

Mediation

1. Universally all countries in pretty much the same formula, recognize mediation as a means of ending litigation and mediation is generally the same understood format country-to-country.
2. It is pretty much universal that mediation can be used for patents, trademarks, copyrights and trade secret theft.
3. Although mediation is used in many countries, there are also many countries that have either not used it, warily applied mediation principles or have had little maturity in developing the procedures for

mediation. It is not a universally used concept.

4. In many countries mediation is available through the court system. And in most such instances it is voluntary. In some (fewer) countries it is not recognized in the court system and there is some question whether intellectual property is a subject appropriate for mediation.
5. It is not believed by most participants in the survey that any court system mediation has worked adequately. For most countries it has either not worked or is in such an early stage that it can't be considered mature enough to be a viable alternative.
6. Mediation (for the most part from the countries responding) can be used for IP disputes. However, it is not used by a fair number of countries. In many countries there are limitations with respect to patent disputes with some countries responding that mediation is not to be used for patent disputes. A large number of countries recognize that mediation can be used for any dispute relating to a patent. Many of the answers go to the underlying problem that mediation is an underutilized and immature set of procedures to date.
7. It is a general consensus of the survey results that there is not an adequate supply of talented mediators. Although continuing education programs are found in many countries, the maturity of adequate mediators is in short supply. Even in the United States where there is substantial desire for mediation and there are many capable mediators, there can be many more.
8. Very few countries have substantial programs set up to allow for the teaching of



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mediation principles and creating new mediations. Although in some countries there are adequate programs to teach an adequate number of new mediators, for the most part according to this survey, most countries to a substantial degree have no adequate programs on teaching. Here is where FICPI can clearly help.

9. Very few countries could identify the best characteristics of a successful mediation program. This is an area that clearly needs attention.
10. It is universally recognized by the responders to this survey that mediation is clearly an accepted alternative in settling a dispute. There were no contra-indicators.
11. When asked whether each country believes there should be a limitation on mediation costs and what that limitation should be, most countries responded by recognizing the mediation should be related to the amount in dispute but that it must be far less than litigation costs. One country indicated between 10,000 and 50,000 Euros as a proper cost. This is probably the range in which a normal mediation would fall. The biggest concern of all countries were the legal fees in making sure a mediation did not cost as much as a litigation.
12. Most countries believe that there should be a cost limitation on mediation. Some countries felt that it was an individual problem to be dealt with individually with each case. However, the overwhelming response was that limitations were appropriate and necessary for mediation to be successful.
13. Although the majority of responses indicated that discovery should not be allowed in mediation proceedings, there were more than a few responses that suggested given the proceeding, it might be necessary to have some discovery for issues that had to be fleshed out in understanding the problem.

Arbitration Survey

Following is a summary of conclusions reached from reviewing the twenty responses to the seventeen questions in the arbitration survey:

1. All countries responded uniformly that they recognized arbitration as a legitimate alternative to litigating patent and other IP disputes.
2. Most countries have arbitration rules, procedure statutes and Acts to promote the use of arbitration. In the United States it is recognized that arbitration is by contract and the rules will be set up by the parties.
3. In all countries arbitration is voluntary, elective and alternative to litigation. No responding country indicated that arbitration was mandatory or part of any court order or rule.
4. Arbitration is rarely used in conjunction with mediation, but there are some responses that indicate that it is a process that can be used conjunctively. There just appears to be very little use of the two methods together in any structure.
5. Most responders believe that arbitration is an adequate substitute for litigating a dispute. There are some countries that believe it is not. For example, one country has indicated that it is not an adequate substitute because it is costly and appealable before a court. Many countries indicated that they did just not have enough information to conclude the adequacy of substituting arbitration for litigation.
6. Although it is not believed there are many governmental limitations limiting arbitration of patent disputes, it was recognized by some countries that validity is not typically a subject matter for arbitration. The validity of a patent is not typically a subject matter for arbitration.
7. In no country is there any court ordered arbitration. It is all voluntary by contract between the parties.



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8. In most cases the arbitration award is accepted without continuous dispute. Some countries indicated certain exceptions if the parties make agreements for continuation of the case after arbitration. But this is generally not the case.
9. For the most part there are an adequate number of highly trained arbitrators to allow the judicial system to work. But there are a few but strongly dissenting views on the adequacy of available arbitrators.
10. Many countries believe that there was inadequate training for arbitrators and that arbitrators were basically litigators who learned arbitration on the fly. The need for arbitration training programs appears to be fairly strong from the survey results.
11. In most countries it was admitted that there are not procedures set up for training of arbitrators. Where there are available systems, it is done separately and privately through either universities or in private organizations.
12. The survey respondents are evenly split on whether it would be wise to acquire technical training and capability for the arbitrator to have in resolving patent disputes through arbitration. Many feel it is not necessary. Many strongly feel it is necessary.
13. Many respondents believe that when given the choice of arbitration or mediation, that it is best to look at the problem individually but that it is not necessary to use them in combination. Many feel that mediation is the quicker, better and cheaper resolver of a dispute. Many others desire a combination of the two procedures.
14. All seem to agree that arbitration, if performed properly, would be cheaper, quicker and more effective than the litigation result. The concern by some is that you may have runaway arbitrators. This can happen. Most are prepared to go with arbitration instead of litigation.
15. With few exceptions and some lack of knowledge, most countries agree that an arbitration can be determined with significant time restraints and with such restraints can create a much less costly dispute resolution than litigation.
16. With some footnotes and some warnings, it is generally believed that FICPI should be a teaching organization to create skilled mediators and arbitrators worldwide. Some countries question whether it is FICPI's role to do so but most believe it should be done. And that FICPI is the right organization to perform the training.
17. The responders are evenly split on whether there should be discovery in arbitration proceedings. Many say it is necessary; many say that it is counterproductive to conducting an efficient and less costly legal proceeding. Many recognize that in some cases it will be needed and in some cases not. All seem to believe that there should be limitation on the discovery parameters as needs arise in the case.

The above seems to clearly indicate that FICPI is concerned about the development of mediation and arbitration as viable tools to resolve disputes, necessary tools to repel litigation. There is also a strong consensus that FICPI should be a player and play a major role in development, training and maturity of persons to be mediators and arbitrators. It is interesting to note, in conclusion, that although the twenty countries responding have a myriad of views on how to attack a dispute and end it efficiently and satisfactorily, all seem to recognize the importance of integrating arbitration and mediation in resolving the issue and in having FICPI have a role in such resolution and developing programs successfully.

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